

MINUTES OF MEETING OF
SOUTH DAKOTA TRUST TASK FORCE
July 27, 2011

The meeting of the South Dakota Trust Task Force was called to order by Chair David E. Lust at 11:00 a.m. Central Daylight Time in Pierre, South Dakota.

The members of the Task Force present at the meeting: David Lust, Director Bret Afdahl, Frances Becker, Todd Bernhard, Brooke Bohnenkamp, Jeb Clarkson, Richard Corcoran; Secretary Pat Costello, Daniel Donohue, Jeffory Erickson, Patrick Goetzinger, Bradley Grossenburg, Charles Habhab, John Lillibridge, Pierce McDowell, Terry Prendergast, Peter Randazzo, Secretary Pam Roberts, Carl Schmidtman, Kim Olson and Mark Sivertson.

The first item on the agenda concerned administrative matters. With regard to distribution of materials and information to members of the Task Force, it was agreed the most efficient and effective method of distribution is to forward all materials through the Chair who will circulate to the entire Task Force.

On the matter of reimbursement for expenses incurred by the Members such as meals and travel, it was agreed that the Task Force will continue with the tradition of no reimbursement for travel and related expenses.

New procedures concerning submission of items for the agenda was discussed and it was agreed the procedure implemented by the Chair of requiring items to be submitted in advance of the meeting and advance distribution of an agenda based on those items will continue.

Patrick Goetzinger then presented a general history and background of the Task Force and noted that this is a time of transition for both the Task Force and the trust industry in South Dakota.

Director Afdahl gave a presentation on the status of the trust industry in South Dakota. He noted that currently two trust companies are in the process of returning their charters, there are nine public trust companies with their own employees in the state with 53 FTE's, 12 file cabinet trust companies with service agreements with other trust companies operating in South Dakota with 10 FTE's in the state, and nine file cabinet trust companies. In addition, two new charters are being issued.

Jeff Erickson raised the issue of the economic impact of trust business in South Dakota. It was determined that a better means of encouraging job creation as well as compiling this information needs to be developed.

John Lillibridge then initiated a discussion as to how we can get more philanthropic participation from the trust industry in South Dakota. Questions arose as to how this would be tracked, governed, and monitored.

Further discussion on the issue concerned the responsibilities of the Trust Task Force members to encourage charitable contributions in South Dakota, and whether current philanthropy and any tangible benefits derived from it can be measured.

Secretary Pam Roberts questioned whether charitable contribution requirements can be codified. Secretary Pat Costello suggested the possibility of requiring an input statement as part of the inspection process. Dan Donohue suggested adding an annual reporting requirement with some of these data fields.

The chief issue remains how to identify and track the economic impact of trust companies. The members agreed that a sub-committee should be formed to develop appropriate mechanisms to encourage and measure the economic development benefits of trust companies. That sub-committee will consist of Director Afdahl, Mark Sivertson, Brad Grossenburg, and Pierce McDowell.

Director Afdahl outlined the current regulatory environment and issues facing the Division. He stated that 6-9 months of budget reserve is necessary under a best practices model for its accreditation with the Conference of State Bank Supervisors (CSBS) and that this reserve can be used in the short term to insure against trust company failures.

Director Afdahl further discussed the need to set up a resolution fund to provide the funding needed to oversee the dissolution of trust companies and the related administrative expense. He identified the issue of how to obtain the capital for the resolution risk fund. He suggested this could be a self-insurance type of fund with an increased pledge being required from certain companies in the interim based upon their risk profile. Discussion was had concerning a special assessment option wherein all trust companies would be assessed. A cap on the assessment would be necessary. However, this method would essentially be penalizing all the trusts for the failure of a few. The other option mentioned was to assess only the public trusts or to charge them an additional fee which would go into the fund.

Jeff Erickson noted that the Banking Commission feels the banks are subsidizing the administrative costs and risk of the trust business and a resolution fund would require trust companies to shoulder more of the cost for their industry.

After a lengthy discussion it was agreed a sub-committee to review the resolution fund issue and report back to the Task Force at the next meeting would be appropriate. The Chair appointed Director Afdahl, Terry Prendergast, Pierce McDowell, and Carl Schmidtman to this sub-committee

Director Afdahl further went on to discuss situs requirements for trusts in South Dakota and what can be done to make them more stringent. He noted the difference between public and private trusts. Adding more informational requirements on the application was discussed.

Director Afdahl then noted that issues exist with regard to attorney-client privilege and reported that a statutory change has been proposed.

The Chair noted that due to the recent “re-organization” of the Task Force and the Governor’s desire to have any proposed legislation be run through his Legislative Task Force a tight time frame was necessary. The Task Force must have its proposals to the LTF by October 1. The meeting then shifted focused to potential statutory revisions.

- (a) Repeal of SDCL 43-6-4: Richard Corcoran noted the need to repeal SDCL 43-6-4, et seq. Following discussion, upon motion and second, the motion was passed. This item will become part of the legislative package for 2012.**
- (b) Decanting Issues: Brad Grossenburg, Frances Becker, and Terry Prendergast brought various decanting issues before the Task Force. Given the complexity of the issue, it was agreed that the three of them will look at this issue and provide a report at the next meeting.**

Pat Goetzinger then reviewed his memo and the issue of proxy voting in a Domestic Asset Protection Trust. The members agreed this issue should be moved to the DAPT group for further action.

Goetzinger also reviewed his memo and he and Frances Becker led discussion as to Third Party Discretionary Trusts and whether a beneficiary should be allowed to serve as a trust advisor. The members agreed this should be added to the discretionary trust list for further action.

- (c) Amendments to SDCL 55-1B: Carl Schmidtman presented his proposal with regard to the amendment of SDCL 55-1B. It was agreed that he should formulate language for the amendments and bring it to the next meeting.**
- (d) Notice to natural parents of minor trust beneficiaries: Dan Donohue commenced discussion of the requirements of SDCL 55-3-35 on notice to natural parents of minor trust beneficiaries. Following discussion, he agreed to formulate some proposed language and bring to the next meeting for further review.**
- (e) SDCL Ch. 21-22: Donohue requested certain portions of SDCL Chapter 21-22 be reviewed. He will give this matter further consideration and make a determination as to whether these issues should be placed on the agenda for the next meeting.**
- (f) Notice v. Waiver: Regarding SDCL 21-22-18 regarding notice versus waiver in court proceedings, Donohue agreed to bring some proposed language to the next meeting for review.** Brad Grossenburg raised the issue regarding notice for guardianship proceedings, but has determined that this issue should be addressed in another manner.
- (g) Captive insurance companies: the matter of captive insurance companies was brought before the Task Force by Todd Bernhard. A brief discussion was had and a decision was reached that Frances Becker and Pierce McDowell will vet this issue and bring it back at some point; however, at this time it will not be a Task Force legislative piece for 2012.**
- (h) UTC integration: Dan Donohue discussed the recommendation by the Bar Association committee to integrate the UTC with existing South Dakota statutes. Following a brief discussion, it was agreed that this is a long term agenda item. Frances Becker will distribute the end product of the UTC group to the Task Force as it contains various items that may be of assistance.**

- (i) **Donor's spouse as settlor for inter vivos QTIP or inter vivos power of appointment:** Donohue will bring proposed language used in various states for review at the next meeting.
- (j) **TOD issue:** Donohue raised the issue of Uniform TOD act. Chairman Lust indicated he planned on bringing the TOD uniform law separate from the Task Force.
- (k) **Section 1012 of UTC:** Grossenburg questioned whether it would be advisable to add Section 1012 of the Uniform Trust Code to South Dakota's trust statutes. Following a short discussion, he agreed that he will bring some proposed language to the next meeting for further discussion.
- (l) **NH laws:** Donohue initiated a discussion regarding the New Hampshire laws on trusts and trust companies. It was agreed that he should bring some proposed language on an issue related to those laws for further discussion at the next meeting.
- (m) **No-contest provisions:** Becker discussed giving consideration to adding a statute to address the enforceability of a no-contest provisions in a trust. She will bring some proposed language to the next meeting for consideration. If the Task Force agrees with the proposal it will be passed to the RPPT section of the Bar.
- (n) **Releases:** Randazzo initiated a discussion of a Delaware statute regarding releases and their enforceability for a trustee when decanting a trust as well as SDCL 55-4-31. He agreed to bring some specific language to the next meeting for further discussion.
- (o) **Garnishment exemption:** After some discussion, Becker agreed that consideration of a statute similar to the Delaware statute exempting banks, trust companies and savings institutions from garnishment and attachment by creditors should be addressed next year.
- (p) **Qualified Disposition statutes:** With regard to review of the qualified disposition statutes and asset protection issues, Becker will circulate materials for review by the Task Force members prior to the next meeting.
- (q) **Ch. 55-5:** Becker will bring proposed language to the next meeting on suggested revisions to SDCL 55-5-16, proposed legislation regarding what tax information can be relied on by a trustee, and a proposal to supplement SDCL 55-5-9 relieving trustees of liability when the trustee is to retain an asset.
- (r) **LLC Statutes:** Regarding her proposal to review the LLC statutes and how they impact national trust business, including possible supplementation of the single member LLC statutes, Becker agreed those issues were a long term agenda item and should be held until next year.
- (s) **Series LLCs:** Terry Prendergast agreed that the dialog with the Business Law Committee regarding series LLC's was a long term agenda item and could be addressed in the future.
- (t) **SDCL 55-5-17:** Terry Prendergast discussed his proposal to revise SDCL 55-5-17 limiting liability of a trustee regarding life insurance policies. After discussion, the Task Force approved his proposed language only to SDCL 55-5-17(a). The proposed revisions to other sections of the statute were deemed not appropriate.
- (u) **Pre-mortem rulings:** Brad Grossenburg led a discussion concerning pre-mortem rulings on trust validity. Legislation from Alaska and Nevada was reviewed and clarification was made that any pre-mortem ruling should be at the election of the trust's creator. Following the discussion, he agreed to work up some language to present at the next meeting.

The members discussed scheduling an additional meeting of the Task Force to discuss the long term agenda items and whether that meeting should be held in the fall or the spring. Further discussion on this time will occur at subsequent meetings.

It was agreed that the next meeting should be scheduled in mid-September. A clear proposal of statutory changes will be completed by October 1, 2011, for the Governor's LTF. Following that meeting the Task Force will likely meet once in October or November to review the final product.

The next meeting of the Task Force will be in Sioux Falls with a date to be determined by the Chair.

The meeting was adjourned at 4:15.